

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Rajesh B. Shah	:	
-vs-	:	
Illinois Bell Telephone Company	:	
	:	03-0494
Complaint as to classification of	:	
residential into business line by	:	
utility company in Chicago, Illinois.	:	

REPLY BRIEF OF SBC ILLINOIS

Illinois Bell Telephone Company (“SBC Illinois”) submits the following reply brief in support of its position that the Commission should deny the claims asserted by Rajesh B. Shah.

INTRODUCTION

The Commission should deny the Complaint for at least four reasons. First, Mr. Shah’s brief consists largely of unsupported assertions about his claims and damages, most of which were not mentioned in the Complaint and were not the subject of testimony. Due process requires that the Commission ignore them in evaluating Mr. Shah’s case. Second, the Complaint has no validity because the record shows that SBC Illinois properly classified Mr. Shah as a business customer, given the location and use of his service. Third, the \$571,120 Mr. Shah seeks as compensation consists almost completely of damages that the Commission has no authority to award. As a result, even if the Commission ruled in Mr. Shah’s favor, it could award him only the nominal difference between the rates for business and residential service. Finally, the record shows that SBC Illinois treated Mr. Shah properly under the Commission rules governing disconnection of customers who are disputing their bills.

I. Complainant's Failure to Conform to Procedural Rules Requires Denial of His Claims.

Mr. Shah's brief has two principal sections: 1) a "Facts" section that lists the parties' trial exhibits and provides a brief description of how each exhibit may support Mr. Shah's position; and 2) a "Conclusion" section that lists various categories of injury for which Mr. Shah seeks compensation and provides a dollar amount for each category. Neither section provides citations to the trial transcript for any factual statements. Indeed, for many statements, it would be impossible to provide such a citation because the topic was never the subject of testimony at the trial. Mr. Shah's failure to support his arguments with citations to the record provides two reasons why his claims should be denied.

First, the absence of citations violates the Commission's rules of practice. Section 200.800 of the rules requires that factual statements in briefs be supported by citation to the record. 83 Ill. Admin. Code § 200.800(a). "Strict adherence to the requirement of citing relevant pages of the record is necessary to expedite and facilitate the administration of justice," and courts can reject a party's argument simply because the party has failed to provide record support for it. Maun v. Department of Professional Regulation, 299 Ill. App. 3d 388, 399, 701 N.E.2d 791, 799 (4th Dist. 1998); see also Avery v. Sabbia, 301 Ill. App. 3d 839, 844, 704 N.E.2d 750, 753 (1st Dist. 1998). The absence of record citations in Mr. Shah's brief makes it very difficult to evaluate (and respond to) his arguments, especially since much of what Mr. Shah asserts was not the subject of any testimony or other evidence.

Second, it is well established that an administrative agency must limit its decision to facts and testimony that are found in the record. Seul's Inc. v. Liquor Control

Comm’n, 240 Ill. App. 3d 828, 831, 608 N.E.2d 530, 532 (1st Dist. 1993); Anderson v. Human Rights Comm’n, 314 Ill. App. 3d 35, 41, 731 N.E.2d 371, 376 (1st Dist. 2000).

This principle arises from a party’s due process right to cross-examine witnesses and offer evidence in rebuttal, which the party cannot exercise if the agency’s decision is based on information that was not admitted into evidence. Seul’s Inc., 240 Ill. App. 3d at 831, 608 N.E.2d at 532-33.

The “Facts” section of Mr. Shah’s brief includes numerous factual assertions that are not found in any testimony or documentary evidence. For example, Mr. Shah discusses a particular date for installation of his service “per my records” (Shah Br. at 1), when those records were never introduced into evidence and he never testified about their content. He also interprets – or rather misinterprets – the content of SBC Illinois records for his account,¹ although that portion of his records was not the subject of testimony by Nancy Doyle, the SBC Illinois witness who could have explained them. And his assertion that he made payments to his account based on “assurance from the defendant that there will not be any complication in future for billing” (Shah Br. at 3) also was not addressed in testimony.

Practically every statement in the “Conclusion” section of the brief – from the different categories of damages to the dollar amounts associated with those categories – was not the subject of testimony. For example, Mr. Shah requests compensation in the amount of \$240,000 for the time he spent dealing with job seekers who saw his erroneous listing as an “employment agency” in the Yellow Pages. Shah Br. at 6.² During the

¹ In discussing SBC Illinois Direct Ex. 5, Mr. Shah asserts that SBC personnel wrote certain comments about his account indicating that “no one is allowed to listen to my call and take any action.” Shah Br. at 3.

² Mr. Shah calculates this \$240,000 figure based on a \$50/hour rate multiplied by a certain number of hours over a four-year period. See Shah Br. at 6 (Item 5).

hearing, Mr. Shah did not mention that job seekers had contacted him, did not testify about how much time per week he spent dealing with such job seekers, and did not state that his time was worth \$50/hour. Because Mr. Shah disclosed none of this information at the hearing, SBC Illinois had no opportunity to cross-examine him about it or offer evidence in rebuttal. As a result, the Commission should not consider any of the factual assertions in Mr. Shah's brief for which he provides no record citation and, in particular, should disregard all of the damages claims discussed on pages 6-7 of his brief.³

II. Mr. Shah Cannot Obtain Greater Relief than His Complaint Requests.

The due process concerns that compel the Commission to ignore all the unsupported factual assertions in Mr. Shah's brief also require that the Commission reject Mr. Shah's effort, in his brief, to expand the scope of his claims against SBC Illinois. It is a fundamental legal principle that a Commission order cannot exceed the scope of the complaint it has before it. "If the ICC were permitted to enter an order that is broader than the written complaint filed in the case then it would be ruling on an issue of which the responding party had no notice and no opportunity to defend or address." Peoples Gas Light and Coke Co. v. Illinois Commerce Comm'n, 221 Ill. App. 3d 1053, 1060, 583 N.E.2d 68, 72 (1st Dist. 1991); see Alton & Southern Railroad v. Illinois Commerce Comm'n, 316 Ill. 625, 629-30, 147 N.E.2d 417 (1925).

The Complaint focused on SBC Illinois' supposed error in classifying Mr. Shah as a business customer when he established service in July 2000. In the complaint, Mr. Shah requested four types of relief: 1) that his service classification (and directory listing)

³ In addition, Mr. Shah seeks compensation in some damage categories for a 48-month period – i.e., from July 2000 through July 2004. See Shah Br. at 6 (Items 2, 5, 6a). There is no evidence in the record about what has happened with Mr. Shah's account after February 6, 2004, the date of the hearing. The Commission thus has no basis to order a remedy for the post-hearing period.

be changed from business to residential; 2) that the balance owed on his account be reduced to zero; 3) that SBC Illinois change his listing address to a post office box; and 4) that the Commission adopt new rules that are more responsive to customers. See SBC Ill. Br. at 7-8 (discussing Complaint, p. 8).

Mr. Shah's brief is much broader, however. It appears to assert a new cause of action in claiming that SBC Illinois induced Mr. Shah to make payments by promising to reclassify the account and that it then failed to keep that promise. See Shah Br. at 3. In addition, most of the categories of damages requested in the "Conclusion" section bear no relation to the four types of relief listed in the Complaint. To the extent that Mr. Shah's brief sets forth causes of action or damage requests beyond what Mr. Shah sought in the Complaint, those claims are irrelevant here, and the Commission should deny them.

III. Mr. Shah Failed to Show that SBC Illinois Misclassified His Service.

The primary issue in this case is whether SBC Illinois properly classified Mr. Shah as a "business" customer when he established service. In his brief, Mr. Shah argues that he contacted SBC Illinois and placed an order for residential service (Shah Br. at 1, 6), and that SBC Illinois "perhaps" re-entered the order under a business classification and then rescheduled the installation. Id. at 2. As SBC Illinois explained in its opening brief, there are at least three reasons why Mr. Shah's classification as a business customer is appropriate.

First, such a classification accords with the SBC Illinois tariff. See SBC Ill. Br. at 9-10. Mr. Shah's premises simply do not constitute "bona fide residential quarters" under the tariff because they lack a personal bathroom and kitchen facilities. See SBC Ill. Direct Ex. 2 (Tariff No. 20, Pt. 4, § 2, ¶ 1.3(B)(2)); Tr. 116-17. His premises are also

clearly in a “commercial location”; every other tenant in his building is a business. Tr. 53-56; SBC Ill. Cross Ex. 2. The SBC Illinois tariff requires the company to provide business service to such a location. See SBC Ill. Direct Ex. 2 (Tariff No. 20, Pt. 4, § 2, ¶ 1.3(A)(2)).⁴

Second, the circumstances under which Mr. Shah placed his order for telephone service show that it was placed as a business order. See SBC Ill. Br. at 10-11. Among other things, the order could only have been created by an SBC service representative specializing in business customers, because residential service representatives cannot take business orders (and vice-versa). Tr. 109-10. In addition, Mr. Shah took advantage of a sales promotion, providing free installation, which was only available to business customers. Tr. 192-93; SBC Ill. Ex. 1.0 (Conrow), Schedule 1.

Third, Mr. Shah has been using the telephone service in running his business, Shah-USA. See SBC Ill. Br. at 9. His brief even admits in several places that he uses the service, and his premises, for business purposes. In discussing a print-out of the Shah-USA website (SBC Ill. Cross Ex. 4) that includes his street address and telephone numbers, Mr. Shah states that, “[f]or credibility purpose a physical address is needed to every business” (Shah Br. at 4), thus admitting that the existence of his “bricks-and-mortar” premises is a vital part of his business operation. He also indicates that he performs some bookkeeping and tax preparation work at the premises. See Shah Br. at 5 (discussing SBC Ill. Cross Ex. 7).

Mr. Shah has failed to show that SBC Illinois acted incorrectly when it classified him as a business customer. The Commission accordingly should deny his Complaint.

⁴ Mr. Shah’s references to the increasing residential character of his neighborhood (Shah Br. at 2, 4) are irrelevant, because they say nothing about the character of his building.

IV. Mr. Shah Can Recover None of the Damages Requested in His Brief.

At the hearing, evidence was presented on only two of the four requests for relief set forth in the Complaint: 1) that SBC Illinois should change Mr. Shah's service classification (and listing) from business to residential; and 2) that it should reduce the balance owed on his account to zero. Cf. SBC Ill. Br. at 15 n.10 (identifying requests for which no evidence was presented). Only one of those two requests – elimination of the \$2600 account balance – has any monetary component.

In contrast, Mr. Shah's brief focuses on money. He seeks a total of \$571,120 in compensation, listed according to 10 categories. Shah Br. at 6-7.⁵ None of the categories of damage, or their mathematical calculation, was the subject of testimony at the hearing. And most are beyond the scope of the Complaint. For the reasons discussed above in Sections I and II, the Commission should not even consider these requests for relief. There are also numerous other reasons why the Commission should deny the relief requested in Mr. Shah's brief.⁶

A. Mr. Shah Seeks Damages Unavailable from the Commission.

Several of Mr. Shah's damage categories appear to seek compensation for the value of Mr. Shah's time (Items 3, 5, 6a, 7, and 10) or for emotional distress he supposedly suffered as a result of his contacts with SBC Illinois (Items 6a, 8, 9). SBC

⁵ Mr. Shah lists the categories in Items 2 through 10 of his "Conclusion" section. The damage request in Item 6 has two components: a yearly salary of \$70,000 for four years (\$280,000), and the amount he has paid SBC Illinois for service (\$1,266.19). SBC Illinois will refer to the former as Item 6a and the latter as Item 6b.

⁶ Item 2 on Mr. Shah's list seeks \$480 and apparently relates to the second telephone line on his account. Shah Br. at 6. Mr. Shah has explained neither the legal theory that entitles him to recover compensation for this second line nor the derivation of the \$480 figure. The Commission thus should reject this damage item.

In addition, Mr. Shah's damage requests are duplicative. If the Commission awards the compensation requested in Item 6a and makes SBC Illinois pay Mr. Shah a "salary" of \$70,000 for four years, that salary presumably would also compensate him for the time he spent dealing with job seekers (Item 5), the time he spent dealing with Commission personnel about the problems with his account (Item 7), and the time he spent prosecuting this action (Item 10).

Illinois' tariff specifically limits its liability for service errors, and clearly precludes recovery for any consequential damages arising from the disputed conduct here. See Jt. Ex. 10 (Tariff No. 20, Pt. 2, § 2, ¶ 3.1).

Both the Illinois Supreme Court and this Commission have ruled that this limitation of liability provision in the tariff precludes a customer from recovering any amount in excess of the cost of service for the term of the mistake supposedly made by the company. See In re Illinois Bell Switching Station Litigation, 161 Ill. 2d 233, 244, 641N.E.2d 440, 445 (1994); Order, Steppin on the Green v. Illinois Bell Telephone Co., Ill. C.C. Dkt. 96-0612 (Aug. 13, 1997) (Attachment A). In Steppin on the Green, the Commission denied a complaint seeking damages based on "lost business, grief and aggravation," relying on the limitation of liability provision in SBC Illinois' current tariffs. Attachment A at 3. As the Commission ruled, such damages "are beyond the scope of the Respondent's liability under tariff." Id. at 4. See also Order, Woods v. Illinois Bell Telephone Co., Ill. C.C. Dkt. 01-0127 (Sept. 26, 2001) (Attachment B) (denying complainant's request for economic damages such as wage compensation, travel time, and cost of replacement telephone service).

Mr. Shah's requests for replacement income and for compensation for aggravation and inconvenience are similar to the claims rejected in Illinois Bell Switching Station Litigation, Steppin on the Green, and Woods. Paragraph 3.1 of SBC Illinois' General Terms and Conditions of Service (Jt. Ex. 10), the validity of which has been confirmed by the Illinois Supreme Court and this Commission, clearly precludes the relief he seeks.

B. Mr. Shah Cannot Recover Damages for an Erroneous Listing.

Two of Mr. Shah's damage categories seek compensation for SBC Illinois' supposed error in listing him as a business, rather than a residential, customer (Items 4 and 5). As SBC Illinois argued in its opening brief (pp. 14-15), any erroneous or omitted listing here cannot form the basis for awarding Mr. Shah more than \$240,000 in damages.

Under the tariffs applicable to residential and business directory listings, SBC Illinois has liability only for incorrect listings for which it charges a customer, and its liability is limited to the amount of those charges for the duration of the error. See SBC Ill. Direct Ex. 8 (Tariff No. 19, Pt. 12, § 1, ¶ 1.1(E)); SBC Ill. Direct Ex. 9 (Tariff No. 20, Pt. 12, § 1, ¶ 1.1(E)). Because Mr. Shah was charged neither for the business listing he claims was erroneous (see Tr. 106), nor for the residential listing he did not receive (see SBC Ill. Direct Ex. 9 (Tariff No. 20, Pt. 12, § 1, ¶ 1.2)), these tariff provisions preclude his receipt of any credit for these supposed mistakes. Cf. Illinois Bell Switching Station Litigation, supra, 161 Ill.2d at 244, 641 N.E.2d at 445. As a result, even if the Commission finds that SBC Illinois incorrectly listed Mr. Shah in its directories, he is not entitled to monetary damages for that error.

C. Mr. Shah's Potential Recovery Is Capped by the Amount of His SBC Illinois Charges.

Mr. Shah's brief provides no discussion of the only request for monetary relief presented in the Complaint: the request that SBC Illinois credit the account for the approximately \$2600 unpaid balance. Complaint, p. 8. As a result, the Commission should conclude that Mr. Shah has abandoned this claim and deny this aspect of his complaint.

Instead, in his brief, Mr. Shah seeks a refund of the \$1,266.19 that he paid to SBC Illinois (Shah Br. at 6, Item 6b), under the theory that he only made these payments in exchange for SBC Illinois' promise that it would straighten out his billing and change his directory listing to residential. Shah Br. at 3.⁷ Mr. Shah is not entitled to a refund of the money he paid to SBC Illinois, for the same reasons that he is not entitled to a credit for the unpaid balance on the account. SBC Illinois explained these reasons in detail in its opening brief and only summarizes them here.

1. Statute of Limitations. All but two of the payments for which Mr. Shah seeks a refund were made prior to August 2001. See SBC Ill. Direct Ex. 3. Any claim by Mr. Shah for a refund is governed by § 9-252.1 of the Public Utilities Act, which requires that a complaint "relating to an incorrect billing . . . be filed with the Commission no more than 2 years after the date the Customer first has knowledge of the incorrect billing." 220 ILCS 5/9-252.1. Mr. Shah was aware of the allegedly erroneous service classification and billing as early as September 2000, when he first contacted SBC Illinois to question the classification of his service (SBC Ill. Direct Ex. 4; Tr. 178), so that he certainly was aware that he was being billed as a business customer when he made payments between September 2000 and August 2001. He did not file his complaint until August 2003, however. The two-year limitation period thus bars him from obtaining a refund for payments made prior to August 2001. See SBC Ill. Br. at 12.

2. Non-SBC Illinois Charges. To the extent that Mr. Shah's \$1266 refund request seeks a return of payments Mr. Shah made for services provided by entities other than SBC Illinois, for something other than local telephone service, the Commission lacks the authority to order SBC Illinois to refund such charges. Mr. Shah's bills

⁷ This theory was never mentioned in Mr. Shah's testimony at the hearing.

regularly included charges for DSL internet service, other internet-related services, and long-distance calls. See SBC Ill. Cross Ex. 3.⁸ As SBC Illinois explained in its opening brief, there are three reasons why Mr. Shah is not entitled to a refund of such charges. First, the Commission lacks authority over disputes regarding charges for interstate calls, international calls, and enhanced services such as DSL internet. Second, none of the entities that provided these services is a party to this proceeding. Third, there is no evidence in the record showing that SBC Illinois' alleged misclassification of Mr. Shah's service had any effect on the rates these third parties charged for their services. See SBC Ill. Br. at 12-13 (explaining arguments).

3. Rate Differential. Mr. Shah's claim is that he was improperly classified as a business customer. As SBC Illinois explained in its opening brief, even if the Commission rules in Mr. Shah's favor on the classification issue, he would only be entitled to the difference between business rates and residential rates for his two telephone lines. See SBC Ill. Br. at 14. Accordingly, to the extent that Mr. Shah is entitled to any refund of payments made to SBC Illinois, that refund should be based on the difference between the two rate classifications,⁹ not on the total amount that he paid to SBC Illinois.

⁸ For example, Mr. Shah's January 2001 bill includes \$79.90 in charges for internet service and only \$46.54 in charges for local service. SBC Ill. Cross Ex. 3 (Jan. 28, 2001 bill). He made a payment in February 2001 that presumably was intended to pay for service provided the prior month. Id. (Feb. 28, 2001 bill).

⁹ At most, the Commission could only order a refund of roughly half the amount that Mr. Shah paid for local service. See SBC Ill. Br. at 14 & n. 9 (explaining differences between residential and business rates).

V. SBC Illinois Did Not Improperly Interrupt Mr. Shah's Service.

Mr. Shah has requested \$6000 in compensation related to the interruption or threatened disconnection of his service. Shah Br. at 7 (Item 7).¹⁰ This issue was not mentioned in the Complaint, and the Commission should not consider it for the reasons discussed above in Section II. In addition, the Commission cannot award such compensatory damages, as discussed above in Section IV(A). Nevertheless, SBC Illinois will address the issue to lay to rest any suggestion that it acted improperly in its collection activity for Mr. Shah's account.

The Commission's rules prohibit SBC Illinois from disconnecting the service of a customer who has filed an informal or a formal complaint, during the pendency of the complaint, for any reason that forms the basis of the complaint. 83 Ill. Admin. Code § 735.200(d). However, the customer gets this protection from disconnection only if 1) he pays the undisputed portion of his bill; and 2) he pays future bills on time. See Id. (referencing 83 Ill. Admin. Code § 735.190(d)(1)). (Copies of the two rules are found in Attachment C.)

The record contains no evidence that SBC Illinois violated these rules. In his testimony, Mr. Shah did not specify the dates when his service was interrupted or when he contacted the Commission's Consumer Services Division ("CSD") regarding his disputes with SBC Illinois. Tr. 67-69. He did, however, suggest that he contacted the CSD only after his service had been interrupted. Id. at 68 (testifying that service was "disturbed a few times but then when I called Illinois Commerce Commission, they

¹⁰ The derivation of this \$6000 figure is unclear. It is possibly based on the amount of time Mr. Shah spent trying to resolve the disconnection issue or on the number of calls he made when attempting to resolve it.

coordinate the reconnection”). Mr. Shah also testified that his service had not been disconnected since he filed his formal complaint in August 2003. Tr. 71.

The evidence shows that Mr. Shah has always had a past due balance on his account and has made no payment on the account since February 2002. See SBC Ill. Direct Ex. 3; Tr. 169. As a result, he has not complied with the requirement in 83 Ill. Admin. Code § 735.190(d)(1) to pay the undisputed portions of his bill.¹¹ He thus had no right under 83 Ill. Admin. Code § 735.200(d) to be exempt from disconnection.

CONCLUSION

THEREFORE, for all of the reasons stated above and SBC Illinois’ opening brief, the Complaint should be denied. The Commission should specifically find that SBC Illinois properly classified Mr. Shah as a business customer. In the alternative, if the Commission reaches the conclusion that Mr. Shah should have been classified as a residential customer, it should only order SBC Illinois to credit his account for the amount of the difference between residential and business rates for local service for the last two years.

Respectfully submitted,

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¹¹ Mr. Shah admitted that he would be liable to pay, at residential rates, for the service he received from SBC Illinois. Tr. 56-57.

CERTIFICATE OF SERVICE

I, James A. Huttenhower, an attorney, certify that a copy of the foregoing
REPLY BRIEF OF SBC ILLINOIS was served on the following parties by U.S. Mail
and/or electronic transmission on June 18, 2004.

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